No. 11338

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Ada J. Alberty,

Appellant,

vs.

United States of America,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

BRIEF OF APPELLANT.

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UNITED STATES OF AMERICA,

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---

BRIEF OF APPELLANT.

I.

Jurisdiction.

The Information below charged the appellant with violation of the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act (52 Stat. at Large 1040; 21 U. S. C. 301 *et seq.*).

The lower court has original jurisdiction of all crimes and offenses cognizable under the authority of the United States (Rev. Stat., Sec. 563(2); 28 U. S. C., Sec. 41(2)).

This Honorable Court has appellate jurisdiction to review by appeal the final decisions of the District Courts (Judicial Code, Sec. 128, as amended; 28 U. S. C., Sec. 225(a)).

The decision of the court below finding the appellant guilty of the offense charged in Count 23 of the Information was entered on May 20, 1946. [R. 21.] Notice of appeal was filed on May 24, 1946. [R. 31.] The time for filing and docketing the record on appeal with this Honorable Court was extended to the 15th day of July, 1946, by order of the lower court [R. 33], and said record was filed and docketed on July 12, 1946.

II.

Statutes Involved.

Section 301(a) of the Federal Food, Drug and Cosmetic Act of June 25, 1938 (21 U. S. C., Sec. 331(a)), provides:

> "The following acts and the causing thereof are hereby prohibited:
>
> "(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded."

Section 502(a) of this Act (21 U. S. C., Sec. 352(a)) provides:

> "A drug or device shall be deemed to be misbranded—
>
> "(a) If its labeling is false or misleading in any particular."

Section 201(m) of this Act (21 U. S. C., Sec. 321(m)) provides:

> "The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

Section 303(a) of this Act (21 U. S. C., Sec. 333(a)) provides:

> "Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

III.

Preliminary Statement.

This is a case of first impression: No appellate court has heretofore construed the provisions of Section 201(m) of the Federal Food, Drug and Cosmetic Act (21 U. S. C., Sec. 321(m)) here involved in a *criminal proceeding.*

The court below held that the phrase "accompanying such article" as used in Section 201(m) meant that "when a drug and a related circular, having a common source and a common destination, come together at their destination, they are united and become one in so far as the buying public is concerned, each, in effect, accompanying the other, whether they arrived at their common destination simultaneously or otherwise." [R. 27.]

The lower court then found the appellant guilty as charged in the Information where the agreed stipulation of facts showed that although the drug and related circular had a common source and a common destination, the drug was shipped in interstate commerce 71 days after

the related circular and they did not reach their common destination simultaneously.

The decision of the lower court holding that the circulars accompanied the drug within the meaning of the Food and Drug Act is an unwarranted construction of that Act and is unsound as a matter of law.

IV.

Statement of the Case.

On December 5, 1945, an Information containing 23 Counts was filed against the appellant by the United States of America, charging multiple violations of the Federal Food, Drug and Cosmetic Act of June 25, 1938 (21 U. S. C., Sec. 301 *et seq.*).

On January 1, 1946, the appellant filed a demurrer to the Information [R. 7-10], on the ground that it did not state facts sufficient to constitute a crime under the laws of the United States and was uncertain, ambiguous and unintelligible. The demurrer was overruled. [R. 13.]

Thereafter, all Counts of the Information were dismissed by the United States, with the exception of Count XXIII [R. 21], and the case under that Count was submitted to the Court upon an agreed Stipulation of Facts. [R. 14, 15.]

The Stipulation shows that on February 7, 1944, the appellant introduced into interstate commerce certain circulars pertaining to the drug calcium pantothenate, and that 71 days thereafter, on April 18, 1944, the drug itself

was introduced into interstate commerce by the appellant, both the literature and the drug being destined for the Natural Food Store in Kansas City, Missouri, the circulars arriving at their destination on February 11, 1944, and the drug arriving on April 25, 1944.

The lower court thereupon held that the circulars accompanied the drug and adjudged the appellant guilty of violating the Food and Drug Act. [R. 22-27.]

The question presented by this appeal is whether, as a matter of law, the circulars in question accompanied the drug within the meaning of the Act.

V.

Summary of Argument.

A. The Criminal and Penal Provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, Should Be Construed and Interpreted Strictly Against the Government and in Favor of the Accused.

1. Issue Presented.
2. Statutes Defining Crimes Are to Be Strictly Construed.
3. Unambiguous Words Used in a Statute Are to Be Given Ordinary Meaning.
4. The Ordinary Meaning of the Word "Accompanying" Is "to go along with."
5. Decision Below Unsound as a Matter of Law.

VI.

ARGUMENT.

A. The Criminal and Penal Provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, Should Be Construed and Interpreted Strictly Against the Government and in Favor of the Accused.

1. Issue Presented.

This appeal presents a question of judicial interpretation. The issue raised is whether the well-established, axiomatic rule of statutory construction that criminal and penal statutes are to be strictly interpreted should be applied to the criminal and penal provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938. The court below declined to apply the rule of strict construction invoked by the appellant and in finding the accused guilty of a crime under the criminal provisions of this Act, resorted to a liberal construction, because the "Act was primarily promulgated to protect the consuming public." [R. 25.]

The issue thus proffered perforces a balancing on the scales of two factors: The consuming public on the one side; the rights of an accused on the other.

The Food and Drug Act, drafted as it was to protect the consuming public from misbranded or adulterated food or drugs, touches the public welfare to an extent which admits of no exaggeration. When civil process is resorted to under the Act, as by way of injunction to re-

strain violation (Sec. 302(a)), or the adulterated or misbranded food or drugs are seized by way of libel of information (Sec. 304), such remedial provisions thereof should be—and have been—construed with liberality.

See:

United States v. Research Laboratories, 126 F. (2d) 42 (C. C. A. 9th—1942), *certiorari denied* 317 U. S. 656 (1942) (involving a libel of information);

United States v. Lee, 40 F. Supp. 801, reversed 131 F. (2d) 464 (C. C. A. 7th—1942), 143 A. L. R. 1451 (involving an injunction);

United States v. Seven Jugs, etc., 53 F. Supp 746 (D. C., Minn.—1944) (involving a libel of information).

When the criminal sanctions of the Act are invoked, however, which can circumscribe personal freedom, there should obtain a strict construction in favor of one accused of violating the Act. Individuals should not be punished without a clear forewarning from the Legislature as to those actions for which penalties may be invoked. The responsibility of Congress for manifesting its will in defining crimes would be ill served by an easy-going judicial construction of the criminal provisions of the Food and Drug Act.

In resolving the issue here, this Honorable Court must determine what yardstick must be employed in construing the word "accompanying" as it appears in Section 201(m) of the Act.

2. Statutes Defining Crimes Are to Be Strictly Construed.

It is a well established rule of statutory construction and interpretation that criminal and penal statutes must be strictly construed against the Government and in favor of the accused.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37 (1820);

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 S. Ct. 625 (1890);

United States v. Chase, 135 U. S. 255, 34 L. ed. 117, 10 S. Ct. 756 (1890);

United States v. Noveck, 271 U. S. 202, 70 L. ed. 904, 56 S. Ct. 476 (1926);

Fasulo v. United States, 272 U. S. 620, 71 L. ed. 443, 47 S. Ct. 200 (1926);

United States v. Resnick, 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126 (1936);

M. Kraus & Bros., Inc., v. United States of America, ... U. S. ....., 90 L. ed. (Adv. Op.) 653 (1946).

In *United States v. Wiltberger* the defendant was found guilty of manslaughter aboard an American ship anchored in a river. The defendant was indicted under the Act of Congress prohibiting manslaughter "on the high seas." The question was whether the place described in the Indictment was a part of the "high seas." The Supreme Court held that the offense charged was not cognizable in the courts of the United States, and used this language:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construc-

tion itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

"It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. *Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. . . .*" (Italics supplied.)

In *United States v. Chase, supra,* the defendant pleaded guilty to violation of the Act of Congress of July 12, 1876 (19 Stats. 90), for unlawfully and knowingly depositing in the mails of the United States an obscene letter. The Act in question prohibited the depositing in the mails of obscene "writing." The question was whether the term "writing" as used in the statute was comprehen-

sive enough to include the term "letter" as used in the Indictment. The Court held that the term "writing" did not include the term "letter," and used this language:

> "It must therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter. . . .
>
> "Another argument on which indictments of this character have been sustained by some of the circuit courts is, that a reasonable construction must be given the statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. *But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress.*" (Italics supplied.)

In *Fasulo v. United States* the petitioner was indicted for conspiracy to violate Section 215 of the Criminal Code. The question was whether the use of the mails for the purpose of obtaining money by means of threats of mur-

der was a scheme to defraud within the meaning of that section. The Supreme Court reversed and said:

> "While, for the ascertainment of the true meaning and intention of the words relied on, regard is to be had to the evils that called forth the enactment and to the rule that a strict construction of penal statutes does not require the words to be so narrowed as to exclude cases that fairly may be said to be covered by them, it is not permissible for the court to search for an intention that the words themselves do not suggest. . . .
>
> ". . . The words of the act suggest no intention to include the obtaining of money by threats. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

In *United States v. Resnick, supra,* the defendant's demurrer to an Indictment charging violation of a Federal statute forbidding the manufacture or sale of containers for fruits and vegetables was sustained. In that case the Act of Congress of May 21, 1928 (15 U. S. C., Sec. 257), declared that standard hampers for fruits and vegetables should be of specified size, and nine such sizes were listed. The defendant manufactured two-quart hampers, which was a size not provided for in the Act. The Supreme Court affirmed the decision sustaining the demurrer, and held:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States v. Wiltberger,* 5 Wheat. 76, 95, 5 L. ed. 37, 42; *Fasulo v. United States,* 272 U. S. 620, 628, 71 L. ed. 443, 445, 47 S. Ct. 200. The clause

> just quoted is crucial; its words are plain and, having regard to the connection in which they are used, must be given the meaning naturally attributable to them. It is obvious that they do not extend to hampers other than the nine classes defined in §1. . . . Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses. *United States v. Lacher,* 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 S. Ct. 625; *United States v. Chase,* 135 U. S. 255, 261, 34 L. ed. 117, 119, 10 S. Ct. 756; *Fasulo v. United States, supra.* . . ."

In the *Kraus* case, *supra,* our Supreme Court during the last Term applied the strict rule of statutory construction to a case involving the penal features of a regulation passed in pursuance to an Act of Congress, which Act is as vital to the consuming public as the Act in question. In the *Kraus* case the question was whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of January 30, 1942. The petitioner was convicted of violating this Act in evading the provisions of a Maximum Price Regulation by forcing customers to purchase unwanted goods on which there was no ceiling price in order to purchase other goods at the ceiling price. The regulation in question made no specific mention of such "tying agreements" or "combination sales," as such practice was common known. It merely provided that price limitations should not be evaded by any indirect method, whether in conjunction with an offer or sale of a price-regulated commodity alone or in conjunction with any other commodity. The Supreme Court applied the strict rule of construction to the regulation issued by the Price Administrator under the Emer-

gency Price Control Act and reversed the conviction below. The Court used this language:

> "The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequence enumerated in Sec. 1, 50 USCA Appx. Sec. 901, 11 FCA title 50, Appx. 25, Sec. 1. *Yakus v. United States,* 321 U. S. 414, 423, 88 L. ed 834, 847, 64 S. Ct. 660. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of §§ 205(b), 4(a) and 2(a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices. *Cf. United States v. Eaton,* 144 U. S. 677, 36 L. ed. 591, 12 S. Ct. 764. Recognizing that sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in Sec. 2(g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.
>
> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal

sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States v. Wiltberger,* 5 Wheat. (U. S.) 76, 94-96, 5 L. ed. 37, 42, 43. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

"In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by contemporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct

must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick,* 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126."

Mr. Justice Rutledge, in a concurring opinion, said:

"Persons reading the regulations to determine what conduct had been forbidden were entitled in my opinion to conclude that the Administrator, whenever he thought tie-in sales were *per se* evasive or in violation of the Act's policy, had expressly so stated and conversely that where he had not expressly forbidden the practice, it was not to be understood as prohibited by general language applicable to many other types of situation but not specifically to this one. This view, I think, would be required if the regulations had been enacted in statutory form. As regulations they cannot be given broader content."

3. Unambiguous Words Used in a Statute Are to Be Given Ordinary Meaning.

The Supreme Court of the United States has recognized the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous. Where there is no ambiguity, however, there is no room for construction.

United States v. Chase, supra;

United States v. Wiltberger, supra.

Is the semantics of the word "accompany" so saturated with ambiguity as to justify a court in deviating from its common and usual acceptation? If that word is ambiguous, courts must give to it the ordinary meaning imparted by the lexicographer. It is in that sense that the legislative draftsmen are presumed to have used the word.

> *Caminetti v. United States,* 242 U. S. 470, 61 L. ed. 442, 37 S. Ct. 192 (1917);
>
> *United States v. Wurts,* 303 U. S. 414, 82 L. ed. 932, 58 S. Ct. 637 (1938);
>
> *Rosenman v. United States,* 323 U. S. 658, 89 L. ed. 535, 65 S. Ct. 536 (1945).

In the *Caminetti* case, involving an indictment under the White Slave Traffic Act of June 25, 1910, the Supreme Court in construing that statute said:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. . . .
>
> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone,* 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to

induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

"Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

4. The Ordinary Meaning of the Word "Accompanying" Is "to go along with."

The word "accompany" is defined in Webster's New International Dictionary (Second Edition) to mean "to go along with"; or "to go with or attend as a companion or associate"; "to incur in association with."

In Funk & Wagnall's Standard Dictionary this word is defined to mean "to go along with or be associated with as a companion"; "to go or be sent with as an incidental or a concomitant."

The meaning of this word is clear and devoid of ambiguity. Under the decisions hereinabove discussed the court below erred in not construing the word "accompanying" as used in the Act to mean "to go along with." It held that, albeit the alleged offending circulars were shipped seventy-one (71) days prior to the shipment of the drugs, the circulars and drugs accompanied each other. There was no authority in the court to thus enlarge, stretch and expand the ordinary meaning of that word.

Cf.:

American Federation of Labor v. National Labor Rel. Bd., 308 U. S. 401, 84 L. ed. 347 (1940);

Hecht v. Malley, 265 U. S. 144, 68 L. ed. 949 (1924).

By so doing, it surreptitiously invades the constitutional province of the lawmakers and indulges in hypercriticism to escape the plain import of the word. The court below lacked authority to extend by intendment the statute defining the crime because it thought the legislature should have been more comprehensive or because the salutary objectives of the Food and Drug Act should not be "circumvented by permitting a lapse of time to exist between the shipment of the drugs and offending leaflets from a common source to a common destination." [R. 23.]

Cf.:

Seven Cases v. United States, 239 U. S. 510, 60 L. ed. 411 (1916);

United States v. Weitzel, 246 U. S. 533, 62 L. ed. 872 (1918).

Congress was empowered in the first instance to define the sense in which the word "accompanying" was employed in the Act (*Cf. Collins v. Texas,* 223 U. S. 288, 56 L. ed. 439 (1912); *Re Monrovia Evening Post,* 199 Cal. 263 (1926)); and in exercising that power Congress had authority to supply its own glossary and one different from the dictionary meaning. See *Fox v. Standard Oil Co.*, 294 U. S. 87, 79 L. ed. 780 (1935). In Section 201 of the Act, Congress defined some sixteen (16) words. The word "accompanying" was left undefined, which strongly suggests that Congress intended the ordinary and usual meaning of that word to apply. The court below was not at liberty to assume that when Congress

said "accompanying" it meant "when a drug and a related circular, having a common source and a common destination come together at their destination, they are united and become one in so far as the buying public is concerned, each, in effect, accompanying the other, whether they arrived at their common destination simultaneously or otherwise." [R. 27.] Nor may the court presume that the omission by the legislators to give a different and unusual import to this word was inadvertent.

See:

> *United States v. Harris,* 177 U. S. 305, 44 L. ed. 780, 20 S. Ct. 607 (1900).

Probability is not a guide which the court in construing this word in a criminal proceeding can safely take.

> *United States v. Wiltberger, supra.*

To depart from the meaning expressed by the words of a statute is to alter it and is not construction, but legislation. That case must be a strong one indeed which will justify a court in departing from the plain meaning of words, especially in criminal or penal provisions of a statute, in search of an intention which the words themselves did not suggest.

> *United States v. Wiltberger, supra.*

5. Decision Below Unsound as a Matter of Law.

First, the lower court held that the circulars and leaflets accompanied each other even though there was a lapse of seventy-one (71) days between the shipping of circulars

and the drug because it felt that to hold otherwise would circumvent the salutary objectives of the Act. [R. 23.] This premise is false for several reasons: (1) The word "accompanying," strictly construed, does not cover a situation where such a lapse of time exists. Congress, had it seen fit, could have given a statutory definition to this word to extend to cases where a lapse of time exists and where the articles and the literature have a common origin and a common destination. (2) If a lapse of time between the shipment of the drugs and the circulars constitutes a circumvention of the Act, it is for Congress, not the courts, to ameliorate. *(Cf. United States v. Chase, supra; United States v. Wiltberger, supra.)* Indeed, Congress corrected the situation found to exist in the Food and Drug Act of 1906. In *United States v. American Druggists Syndicate,* 186 Fed. 387 (1911), the indictment charged the defendant with misbranding a drug under the 1906 Act, in that there was enclosed with the article of drug a circular containing false statements. A demurrer to the indictment was sustained on the ground the word "misbranded," as used in the 1906 statute, did not apply to a circular enclosed in the container. In order to prevent further circumvention of the Food and Drug Act, Congress passed the amendment of August 23, 1912 (21 U. S. C., Sec. 10, Third), and the provision regarding misbranding was changed to provide that a drug should be deemed misbranded if "its package or label should bear or contain" any false statement. (See *Seven Cases v. United States, supra,* construing this amendment.) (3)

If the leaflets, shipped separately, were false or misleading in a material respect, the sender would be amenable to the provisions of the Federal Trade Commission Act (15 U. S. C., Sec. 41 *et seq.*) and could not thus escape sanctions. There would be, in such case, no circumvention of law.

Second, the lower court did not apply the usual rule of strict construction of criminal statutes to the criminal and penal provisions of the Food and Drug Act, but gave to them a liberal construction in a criminal case, and relied upon decisions, in reaching such conclusion, which did not involve criminal proceedings, but involved civil cases. [R. 23-25, 26.] If the rule of strict construction is applicable to a Regulation issued under the Emergency Price Control Act, *a fortiori,* it is applicable to the Federal Food, Drug and Cosmetic Act. (*See M. Kraus & Bros., Inc., v. United States, supra.*)

Third, the lower court's holding that "when the drug and related circular came together the prohibited act occurred, irrespective of the circuitous route each may have traveled" [R. 25] and irrespective of the seventy-one (71) day lapse in time, is not judicial construction of the word "accompanying"; it is judicial legislation. A more sweeping construction of this statute cannot be conceived. The words of the lower court's pronunciation are at violent war with the words of the statute. The decision opens the floodgates: Under it conviction could be had where the lapsed time between the shipment of a drug and circulars is one year; or two years; or ten.

VII.

Conclusion.

The criminal and penal provisions of the Federal Food, Drug and Cosmetic Act should be strictly construed. The word "accompanying," as used in the Act, should be afforded its usual and ordinary meaning in a criminal prosecution thereunder.

The lower court's decision that the drug and leaflets accompanied each other within the purview of the Act where there was a lapse of seventy-one (71) days between the shipping of the circulars and the drug is unsound and should be reversed.

Respectfully submitted,

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